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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-7481

RALPH E. PURVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This case involves the question whether the Congress has the Constitutional power to enact a regulatory tax with a retroactive effective date fourteen months prior to enactment.

Since Petitioner represents himself Pro Se, in plain and personal language, the question is: Can the Congress reach back fourteen months and put its heavy hand in my pocket and strip me of $115,736.38 as a penalty for legitimate business transactions consummated prior to date of enactment of a regulatory tax? Have I been robbed by my own government?

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reproduced as Appendix A to this Petition, and is reported in 501 F.2d 311. The majority opinion commences on page A-1 of Appendix A and the dissenting opinion commences on page A-6.

The District Court Memorandum Decision is reproduced as Appendix B to this Petition and is reported in 344 F. Supp. 785.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 18, 1974. A Petition for rehearing was denied on September 30, 1974 and this Petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The questions presented by this Petition are:

1. Whether the Interest Equalization Tax Act, enacted on September 2, 1964, is constitutional as applied retroactively to purchases by Petitioner in Canada, through a Canadian brokerage firm, of Canadian stocks between July 18, 1963 and September 2, 1964, with funds located in Canada prior to July 18, 1963, thus involving no outflow of United States funds.

2. If constitutionality of the Act, as so retroactively applied, depends on notice or warning of the proposed legislation, whether notice or warning actually given was adequate as applied to an investor who was merely putting to use Canadian funds, already on hand in Canada prior to

the notice or warning, in transactions involving no outflow of United States funds and having no effect on the United States balance of payments.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

26 U.S.C. 4911 provides in relevant part:

"*Imposition of tax*

2(a) *In general.*—There is hereby imposed, on each acquisition by a United States person *** of stock of a foreign issuer, or of a debt obligation of a foreign obligor ***, a tax determined under subsection (b).

(b) *Amount of tax.*—

(1) *Rates of tax.*—***

(A) *Stock.*—The tax imposed by subsection (a) on the acquisition of stock shall be equal to 15 percent of the actual value of the stock.

2(c) *Effective Date.* —

(1) *General Rule.* — *** The amendments made by this section shall apply with respect to acquisitions of stock and debt obligations made after July 18, 1963."

(Pub. L. No. 38-563, 78 Stat. 809, adding Chapter 41 to Subtitle D, Internal Revenue Code of 1954, enacted September 2, 1964)

The Fifth Amendment to the Constitution of the United States provides as follows:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ." ..... USCA .....

STATEMENT OF THE CASE

This is an action for recovery of $115,736.38 in taxes paid by Petitioner, as imposed retroactivley under the Interest Equalization Tax Act, upon purchases of Canadian stocks. The facts herein recited are admitted.

The Interest Equalization Tax Act, 28 USCA 4911, *et seq.*, enacted September 2, 1964, imposed a tax of fifteen per cent of the purchase price of foreign stocks and was made retroactive to July 18, 1963. The Presidential message to Congress on July 18, 1963, requesting its enactment, and all notice to the public attending the request, indicated the sole purpose was to prevent the further outflow of U. S. dollars after July 18, 1963 so as to improve the balance of payments.

The Act was regulatory in nature and not enacted for the purpose of raising revenue, and was a completely new and novel tax.

Prior to July 18, 1963, Petitioner had maintained in Canada a brokerage account of substantial size and quantities of Canadian stocks. During the retroactive period in question, namely: July 18, 1963 to September 2, 1964, Petitioner did not transfer any U. S. funds to his Canadian brokerage account, but during that time period Petitioner did make purchase of Canadian stocks in said brokerage account using funds already on hand in Canada in that account prior to July 18, 1963. During the retroactive period of fourteen months, Petitioner did not export any U. S. dollars with which to make the stock purchases.

The tax paid was on these purchases during the retroactive period. The Act made no distinction between purchases financed with capital already located outside the U. S. prior to July 18, 1963, and purchases made with capital exported between July 18, 1963 and September 2, 1964.

The District Court dismissed Petitioner's complaint—Appendix B. The Court of Appeals upheld the District

Court in a 2-1 split decision, in which a District Judge, sitting by designation, joined a Circuit Judge in the majority opinion—Appendix A.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Has Erroneously Decided an Important Question of Constitutionality of a Federal Statute Enacting a New and Novel Regulatory Tax, With Respect to Its Retroactive Taxation of Transactions Prior to Date of Enactment

(a) *The Split Decision Is in Direct Conflict With Prior Applicable Decisions of the Supreme Court*

The Court decisions which sanction some degree of retroactivity in tax bills are confined to income tax acts and other tax measures having a *revenue* purpose, and the principal ground of decision is the over-riding interest in providing revenue for government needs. The Interest Equalization Tax Act was a new and novel regulatory tax, not to raise revenue, but to deter transactions which would have an adverse effect on the balance of payments.

The Supreme Court has rendered a total of eight decisions involving the constitutionality of retroactive tax bills. Five of these decisions disapproved retroactivity of gift and estate taxes and are: *Nichols v. Coolidge*, 274 U. S. 531 (1927), *Blodgett v. Holden*, 275 U. S. 142 (1927), *Untermyer v. Anderson*, 276 U. S. 440 (1928), *Coolidge v. Long*, 282 U. S. 582 (1931), and *Helvering v. Helmholz*, 296 U.S. 93 (1935). Three of the eight decisions approved retroactivity and are: *Milliken v. U. S.*, 283 U. S. 15 (1931), *U. S. v. Hudson*, 299 U. S. 498 (1937), and *Welch v. Henry*, 305 U. S. 134 (1938). Of these, the latter two deal with income taxes and the first involves a tax on a gift in contemplation of death.

The *Welch* case, decided in 1938, is the latest decision of the Supreme Court on the question involved, and upheld the validity of a retroactive income tax in a four to four decision, saying that the tax might "approach or reach the limit of permissible retroactivity." (which comment referred to a retroactive period of 15 months) However, the *Welch* case reaffirmed the Court's prior holdings declaring retroactive taxes unconstitutional in the cases cited above where the taxpayer might well have refrained from the conduct creating tax liability "had he anticipated the tax. . . ." 305 U. S. at 147. The language of the *Welch* decision establishes guidelines for testing unconstitutionality, which will be sanctioned only if, (1) the tax is not imposed on a voluntary act, or (2) the taxpayer was forewarned of the possible tax increase, or (3) the taxpayer was forewarned by the previous practice of Congress.

No one of these points is applicable to Petitioner's case. Ours is not a revenue measure, which is at the core of the first point. Ours does involve a voluntary act which is the second point, and ours is not supported by the pattern of retroactivity applicable of income taxes, which is the third point.

The Court of Appeals decision is in direct conflict with the aforementioned Supreme Court decisions disapproving retroactivity and in direct conflict with the guidelines for determining the question as established in *Welch v. Henry.* The majority opinion relies upon a decision by the Court of Claims as precedent to overrule the aforementioned Supreme Court decisions. That Court of Claims decision is *First National Bank v. U. S.*, 420 F.2d 725 (1970).

The dissenting opinion of the Honorable Judge Wallace in the Ninth Circuit Court of Appeals correctly analyzes the law and we quote therefrom as follows: (Appendix A-10-11)

> "The present case is almost identical to *Untermyer v. Anderson*, 276 U.S. 440 (1928). The Revenue Act of 1924, 43 Stat. 313, imposed a tax on all gifts made any time during the calendar year of 1924, but did not become effective until June 2, 1924. Prior to its decision in *Untermyer*, the Court held the tax unconstitutional as applied to a gift made in January, 1924, on the ground that it was arbitrary as to be a denial of due process. *Blodgett v. Holden*, 275 U.S. 142 (1927). In that case, the Court stated that '[i]t seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gift should thereafter be required to pay a charge for so doing.' 275 U.S. at 147. In *Untermyer*, the Court considered the constitutionality of the same tax as applied to a gift made on May 23, 1924, just 12 days before the Act was approved by the President. The government argued that as retroactively applied to this gift the tax was not unconstitutional because the taxpayer had ample notice of the proposed tax and, in all likelihood, had made the gift at that particular time to avoid tax liability. The government pointed out that the gift was made three months after the proposed tax had been presented and while the conference report was still pending. The Court rejected the argument, holding the retroactive application of the tax unconstitutional. The Court stated:
>
> > " 'The mere fact that a gift was made while the bill containing the questioned provisions was in the last stage of progress through Congress we think is not enough to differentiate this cause from the former one and to relieve the legislation of the arbitrary character there ascribed to it. To accept the contrary view would produce insuperable difficulties touching intepretation and practical appli-

> cation of the statute, and render impossible proper understanding of the burden intended to be imposed. The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken.'
>
> "276 U.S. at 445-46.
>
> "The taxpayer in the present case, like the taxpayer in *Untermyer*, may have had ample notice of the proposed tax. But as the Court stated he should not be required to guess on what the legislative outcome would be. This holding seems particularly appropriate in the present case because the taxpayer was required to guess the legislative outcome of the tax through the entire legislative process, whereas in *Untermyer* the tax had already passed both houses of Congress and awaited only the conference report, final congressional approval and the signature of the President.
>
> "I would hold the tax as applied to the transactions involved in this case unconstitutional."

The most thoroughgoing article on the subject (Novick & Petersberger, Vol. 37, *Taxes* page 407, May 1959) approves the test of novelty as the test to be derived from the decisions and also as the correct test and approves the *Untermyer* language just mentioned as stating the applicable law as applied to new and novel taxes, (page 428):

> "But if the newness of the tax and the fairness of the notice are underscored and are taken as implicit limitations on the exercise of Congressional power; then the majority's position, though unable to cite any precedent other than Blodgett, would seem to be a valid and necessary part of 'ordered liberty'. We believe that fairness as well as power should be insep-

arable, rather than separable, parts of any due process test."

(page 432):

"In conclusion, this review of the retroactivity cases has shown that although Congress has the undoubted power to tax retroactively, it must exercise this power in a manner which is consistent with the courts' notions of the due process of law. In the past these notions have in general, meant that *innovations* in the taxing system should be prospective from enactment, but *revisions* in the established taxing system whether in the form of changes in rates or definitions or calculations – may at the least be retroactive within the calendar year and may be retroactive for an even longer period if no undue hardship results." (Emphasis supplied)

Another writer (Hochman, 73 Harvard Law Review 692, 706, 1960) reaches a similar conclusion, although the emphasis is not so much on newness or novelty of the tax. Hochman's emphasis is on the point that a taxpayer cannot say that nontaxability of income caused him to make a change of position because he would never elect to forego the income. Thus he explains the permitted retroactivity in income tax bills. But in the gift tax and estate tax area the taxpayer may have made a change of position in reliance on non-taxability. Thus Hochman makes a distinction between income tax bills and other retroactive tax measures as follows: (page 706, 707, 708)

"The primary consideration which appears from an analysis of the cases involving retroactive taxation is the ability of the taxpayer, at the time of the transaction in dispute, reasonably to have foreseen that a tax would be imposed, and the likelihood that, having been able to foresee it, he would have altered his conduct to avoid the tax. Under this standard, no federal income tax has ever been held invalid on the ground that it was retroactive. It is thought that the

taxpayer, even if he had known that the tax would be imposed, would have received the income; therefore, it is not unfair to impose the tax since the taxpayer in no way relied on the nontaxability of the income.

• • •

"• • • The justification for upholding retroactive income taxation does not apply to estate and gift taxes, since with respect to these taxes it cannot be assumed that the taxpayer would have disposed of his property in the same manner had he known that it would be subject to the tax. Thus there are some cases holding retroactive gift and estate taxes unconstitutional on the ground that 'the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event.' The leading gift-tax case is Untermyer v. Anderson, 276 U.S. 440 (1928), in which a gift-tax statute was held unconstitutional when construed to apply to a gift made during the ten-day period between submission of the conference report to Congress and its approval by the President. The majority refused to hold that the taxpayer was on notice that the gift might be subject to the tax because of the imminence of the passage of the statute – the taxpayer 'cannot foresee and ought not be required to guess the outcome of pending measures.' • • •"

(b) ***The Decision Has Misapplied Applicable Decisions of the Supreme Court With Respect to the Admitted Fact That the Transactions Taxed Retroactively Were Outside the Scope and Purpose of the Act and Notice Thereof to the Public Prior to Enactment***

Petitioner did not export any dollars with which the purchases were made and upon which the tax was levied and paid. The *First National Bank* case, 420 F.2d 725, relied upon heavily by the majority opinion, involved the interest equalization tax act, but that case did not deter-

mine the question as to whether the tax would be constitutional as applied retroactively to purchases where there had been no capital exported. The majority opinion, in relying upon that decision, has overlooked Note 12 to that decision in which the Court of Claims Judge states that he did not consider that question, where no outflow of funds occurred during the retroactive period, because the issue was raised for the first time in the reply brief and was untimely.

All of the notice to the public, including Petitioner, of the request for legislation to enact the Interest Equalization Tax Act, stated the purpose of the Act was to deter outflow of U. S. dollars. Therefore in applying the tax to Petitioner's purchases, Petitioner was taxed as if he had actually exported funds.

A law may work validly and without violation of due process as applied to persons circumstanced in one way and be void for want of due process as to others differently circumstanced. If Petitioner, during the limbo period of retroactivity, had arranged an outflow by using United States dollars for his purchases he would fall within the intended scope of the July 18, 1963 retroactivity, and the Presidential warning of July 18, 1963 might have been understood as applicable to him.

But that is not this case. Petitioner did not arrange an outflow of United States funds after the effective date of the Act. His conduct was not within the intended scope or purpose of the desired retroactivity. For the same reason, the Presidential message and other announcements of the intended retroactivity would not be thought to apply to what Petitioner did.

The majority, on page 5, admits there was no need for Congress to apply the retroactive application of the tax where there was no outflow of U. S. funds, but states that the lack of need was not the same as lack of notice. Plaintiff submits that this conclusion of the majority is faulty. If there was a lack of need, then it is clear persons such as plaintiff would be on notice only that transactions would be taxed retroactively only where there had been an outflow. The need for retroactive application was only to discourage outflow, and plaintiff caused no outflow, and therefore taxing his transactions was harsh and oppressive.

The majority relies upon the cases of *United States v. Heinszen*, 206 U. S. 370 (1907), and *Mattingly v. District of Columbia*, 97 U. S. 687 (1878), which involved Congressional ratification of executive imposition of taxes. These cases are not in point, as has been pointed out in the dissenting opinion of Judge Wallace, Appendix A, pages 8-9. Also, it should be noted that those two ratification decisions antedate both *Welch v. Henry* and *Untermyer v. Anderson, supra.*

(c) *The Issue of Retroactive Regulatory Taxation Is of Extreme Importance to the Public in Conducting and Planning Business Transactions*

The continually increasing need for revenue by the Federal government seems to increase the legislative use of the retroactive feature in the enactment of tax bills. No doubt this temptation to extend the use of retroactivity will be utilized more and more by Congress. As a result normal business transactions by the public will be subjected to the increased impact of a possible retroactive tax increase which cannot be anticipated and the impact

of which cannot be forecast or passed on in the business world. Normal business planning and execution of business transactions therefore cannot be conducted with any degree of certainty. The public should not be subjected to this hazard from Congress. The Supreme Court has not examined this problem since *Welch v. Henry, supra*, in 1938. Since that decision was a four to four decision, and since there has been no decision of a federal Court on the decision until the instant case and *First National Bank v. U. S., supra*, the decision in *Welch v. Henry* and the antecedent cases cited in this petition, are ripe for re-examination by the Supreme Court. The question would seem to be whether those decisions still have vitality in the face of Congressional encroachments, and do those decisions need clarification?

(d) *The Decision Is Unduly Harsh in Its Impact Upon Petitioner*

The application of the tax to Petitioner's transactions was harsh and oppressive in the extreme. Petitioner was taxed retroactively as if he had caused an outflow of U. S. funds, which the Act was designed to discourage. Yet Petitioner, in fact, had caused no outflow. The use of Federal power in this instance, with respect to Petitioner, was so unfair to the Petitioner as to deprive him of his property without due process of law as guaranteed to him by the Fifth Amendment to the Constitution.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in

Ralph E. Purvis v. United States of America, No. 72-2001 (July 18, 1974), or, in the alternative that the judgment be reversed.

Respectfully submitted,

RALPH E. PURVIS
Petitioner, Pro Se

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RALPH E. PURVIS, *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. 72-2001 OPINION Filed July 18, 1974, Clerk, U.S. Court of Appeals

On Appeal from the United States District Court for the Western District of Washington

Before: MERRILL and WALLACE, Circuit Judges, and BURNS, District Judge*

MERRILL, Circuit Judge:

Plaintiff seeks to recover taxes paid by him under the Interest Equalization Tax Act of 1964.[1] His claim is that imposition of the tax upon the transactions involved constituted a violation of due process, in that the applica-

*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

1. (*Page 1*) Pub. L. No. 88-563, §2(a), 78 Stat. 809, adding Chapter 41 to Subtitle D, Internal Revenue Code of 1954 (codified at 26 U.S.C. §§ 4911 *et seq.*)

26 U.S.C. §§ 4911 provides in relevant part:

> "*Imposition of tax*
>
> (a) *In general.*—There is hereby imposed, on each acquisition by a United States person • • • of stock of a foreign issuer, or of a debt obligation of a foreign obligor • • •, a tax determined under subsection (b).
>
> (b) *Amount of tax.*—
>
> (1) *Rates of tax.*—• • •
>
> (A) *Stock.*—The tax imposed by subsection (a) on the acquisition of stock shall be equal to 15 percent of the actual value of the stock."

Section 2(c) of Pub. L. No. 88-563 provided in part:

> "*Effective Date.*—
>
> (1) *General Rule.*—• • • [T]he amendments made by this section shall apply with respect to acquisitions of stock and debt obligations made after July 18, 1963."

tion of the tax to those transactions was retroactive. In the district court, following trial, judgment for the United States was entered. *Purvis v. United States*, 344 F.Supp. 785 (W.D.Wash. 1972). This appeal was taken by the taxpayer.

On July 18, 1963, President Kennedy in a message to Congress[2] proposed a series of coordinated actions to alleviate a serious balance of payments deficit. Included was an "interest equalization tax" to be levied on purchases by Americans of foreign securities, the purpose being to restrict long term capital outflow from the United States by making it more expensive to borrow in the American market. The President in his message made it clear that if the tax was to achieve its purpose, it was essential that legislation creating the tax be made effective as of the date of the presidential message—July 18, 1963. Otherwise a rush by investors to beat the deadline would serve to aggravate the problem and render the proposal self-defeating.[3]

The President's message was well publicized in the newspapers and financial journals. The market in foreign securities was promptly affected. On the day of the message the Treasury Department issued documents giving details of the proposed tax. A "Notice of Proposed Effective Date" with a description of the proposed Act was published in the Federal Register on August 16, 1963. The Act in substantially the form proposed by the President was signed into law September 2, 1964, with an effective date of July 18, 1963.

Plaintiff taxpayer, a resident of the State of Washington, had for many years invested in Canadian securities and maintained a margin brokerage account in the Victoria, British Columbia, office of a Canadian brokerage firm. Between July 18, 1963, and August 2, 1964, he purchased various Canadian stocks. The purchases were made through his Canadian account, to which no United States dollars were transferred during the period in ques-

2. (*Page 1*) H.R. Doc. No. 141, 88th Cong., 1st Sess.; 109 Cong. Reg. 12806 (Senate), 12940 (House) (1963).

3. (*Page 2*) 109 Cong. Rec. at 12809, 12943.

tion. Thus, although taxpayer purchased foreign securities during the period between the effective date and enactment —the period of retroactive application—he did not, during that period, contribute to outflow of capital from the United States.

In engaging in the stock purchases in question taxpayer knew of the President's message and of his desire for retroactive application, and the reason for that desire. He knew of nothing in the proposals that would exempt his transactions. He knew that the tax as proposed would cover foreign security purchases paid for with foreign funds of Americans. He joined with other investors in unsuccessful efforts to have the tax modified by Congress to exclude transactions not involving "outflow."[4]

Taxpayers recognizes that modifications of income taxes have regularly been imposed retroactively, as discussed in *Welch v. Henry*, 305 U.S. 134 (1938). He insists, however, that the law is otherwise as to new and novel taxes upon transactions theretofore free from taxation. He relies upon decisions holding unconstitutional retroactive application of estate and gift taxes: *Coolidge v. Long*, 282 U.S. 582 (1931); *Utermyer v. Anderson*, 276 U.S. 440 (1928); *Blodgett v. Holden*, 275 U.S. 142 (1927); *Nichols v. Coolidge*, 274 U.S. 531 (1927). Taxpayer concludes from these authorities and from the Court's discussion of the problem in *Welch v. Henry, supra*, that retroactivity can be sanctioned only if the tax is not imposed upon a voluntary act, or if the taxpayer is forewarned of retroactivity by the statute books themselves or by previous practices of Congress.

These contentions, with respect to this same tax, were advanced by a taxpayer and rejected by the Court of Claims in *First National Bank in Dallas v. United States*,

4. (*Page 3*) Congress rejected such modifications for a variety of reasons: that such exemptions would enlarge the pool of foreign securities which United States persons could trade free of tax among themselves; that they would give undue advantage to United States persons who had previously acquired foreign funds over those who had not; that they would encourage United States persons with foreign funds to invest in foreign securities rather than United States securities; that they would create administrative difficulties in enforcing the tax; that they could create multiple exchange rates; that there would be a loss of revenue.

190 Ct.Cl. 400, 420 F.2d 725 *cert. denied*, 398 U.S. 950 (1970). The court there stated that it could "perceive no such rigid standard of constitutionality in the decided cases." It further stated:

> "We are guided, rather, by the more flexible criteria delineated by the Supreme Court in *Welch v. Henry, supra*, 305, U.S. at page 147, 59 S.Ct. at 126:
>
> "'• • • In each case it is necessary to consider the *nature of the tax* and the *circumstances in which it is laid* before it can be said that its retroactive application is *so harsh and oppressive* as to transgress the constitutional limitation.
>
> [Emphasis supplied (by the Court of Claims).]"
>
> "Accordingly, it is our view that where there is reasonable cause to believe or expect that a tax will be imposed upon a presently nontaxable transaction, the retroactive application of such tax does not constitute a denial of due process." 420 F.2d at 730.

We agree with that view.

Taxpayer here seeks to distinguish *First National Bank in Dallas* in that in that case there had been an outflow of funds to Canada caused by the purchases of the taxpayer, while in this case there was none. Taxpayer asserts that while he did indeed have notice that Congress contemplated applying the tax to such cases (purchases made with funds already located abroad), he had no notice that the tax would be retroactively applied to such transactions. He protests that such notice as was given of the retroactive application of the Act was coupled with notice of the need for such application—to prevent frustration of the tax's purpose by massive outflow of funds in response to a desire to beat the deadline. While he acknowledges, arguendo, the validity of Congress' justification for extending the tax to include foreign transactions with foreign funds (see note 4, *supra*), he insists that there was no need whatsoever to apply the tax retroactively to such transactions. Since the funds were already out of the country there obviously could be no need to rush to get them out of the country to beat any deadline and as to

those funds there was therefore no need for retroactive application of the tax.

We may accept that there was no need.[5] We cannot agree, however, that lack of need was the same as lack of notice that the tax would be applied. From the outset the public was on notice that the tax as defined was (by presidential exhortation, at least) to be retroactively imposed across the board. Never was there any reliable suggestion that it would become effective on different dates for different transactions depending upon the source of funds.

We conclude, as did the Court of Claims, that with the widespread notice given to the investing public it cannot be said that retroactive application of this tax was oppressive or harsh or confiscatory. With the undeniable need for retroactive applicaton in general if the purpose of the tax was to be realized, it cannot be said that retroactive application of the tax was arbitrary or capricious. Since general retroactive application cannot be said to violate due process, we are satisfied that taxpayer had no constitutional right to have certain transactions carved out to be subjected to prospective application only.

Taxpayer makes a further argument which we feel warrants discussion. Notice, he insists, in order to suffice under *Welch v. Henry, supra,* must have been by the statute books themselves or by the practice of Congress. He points to language in *Untermyer v. Anderson, supra*:

> "The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot forsee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken." 276 U.S. at 445-46.

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5. (*Page 5*) We note, however, that at least one of the considerations which led Congress to decline to exempt such "no outflow" transactions from the tax generally (see note 4, *supra*), namely the avoidance of administrative difficulties, also militated strongly against exempting such transactions from the retroactive feature.

Taxpayer contends that to give the President's request for retroactive application the effect of legislative notice is to put the investor on the horns of a dilemma since he cannot foresee whether Congress will grant the request or not. Further, he contends, to give such effect to the President's request is to countenance a violation of the principle of separation of powers.

However, it was not the act of the President that gave retroactive application to the tax measure. It was the action of Congress that did so. In *United States v. Heinszen & Co.*, 206 U.S. 370 (1907), and *Mattingly v. District of Columbia*, 97 U.S. 687 (1878), the Court early recognized the power of Congress to ratify unauthorized Executive action taken in the area reserved to Congress, and thus retroactively to validate such action. We feel we can confidently leave to Congress, as a purely political matter, the control of such instances of interaction between the departments. If at any time the Congress feels the President to be overreaching in seeking to create legislative consequences from Executive proclamation or request, it can reject the request for retroactive application.

It is true that this uncertainty as to outcome—as to whether certain transactions are to be taxed, and, if so, whether retroactively—can create difficulties for an affected citizen attempting to order his life, business or property. Here again, however, we feel that the proper due process test is that stated in *Welch*: "the nature of the tax and the circumstances in which it is laid" are to be taken into balance in determining whether the uncertainty imposed upon the investor is "so harsh and oppressive as to transgress the constitutional limitation." We do not find that to be the case here.

Judgment affirmed.

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent.

The majority threads a delicate course in discussing case authority as it upholds the retroactive application of the Interest Equalization Tax Act of 1964. In doing so,

it brushes aside too lightly the obvious distinctions between the present case and the prior cases it cites which upheld retroactive taxation. The majority rejects the taxpayer's argument "that retroactivity can be sanctioned only if the tax is not imposed upon a voluntary act, or if the taxpayer is forewarned of retroactivity by the statute books themselves or by previous practices of Congress." The majority draws comfort from the Court of Claims which, when faced with the same issue as we have before us, found that the Supreme Court in *Welch v. Henry,* 305 U.S. 134 (1938), had not established such a "rigid standard of constitutionality" and upheld the tax. *First Nat'l. Bank v. United States,* 420 F.2d 725, 730 (Ct.Cl.), *cert. denied,* 398 U.S. 950 (1970). The correct test as established by the Supreme Court, the majority asserts, is "to consider the nature of the tax and the circumstances in which it is laid" before determining its constitutionality. The majority and the Court of Claims both ignore the fact that in *Welch,* the Court reaffirmed its prior holding declaring retroactive taxes unconstitutional where the taxpayer might well have refrained from the conduct creating the tax liability, "had he anticipated the tax. . . ." 305 U.S. a 147. In addition, the *Welch* Court distinguished *Coolidge v. Long,* 282 U.S. 582 (1931); *Untermyer v. Anderson,* 276 U.S. 440 (1928); and *Nichols v. Coolidge,* 274 U.S. 531 (1927), which held retroactive taxes unconstitutional, from the case before it on the ground that it could not assume that the taxpayer would have refused to receive the income even if he had known that it "would later be subject to a new tax or to the increase of an old one." 305 U.S. at 148. The tax upheld in *Welch* was an income tax on corporate dividends. Prior to the enactment of the tax this source of income had essentially been free from taxation. The law became effective in 1935 but imposed a tax upon income earned in 1933 and 1934. The law specifically declared "that the levy was an emergency tax to provide revenue for relief purposes. . . ." 305 U.S. at 142.

By comparison, the interest equalization tax is primarily regulatory. As the majority states, its purpose was "to restrict long term capital outflow from the United States by making it more expensive to borrow in the American

market." The raising of revenue was only an incidental benefit. Given this statement of purpose, the retroactive application of the tax cannot be justified on the ground that the taxpayer would have conducted his affairs exactly the same even if he had absolute knowledge the tax would be retroactively applied. From a realistic point of view, if the taxpayer were sure of taxation, he may well have not continued to invest in the foreign market since the tax was so substantial as practically to eliminate the likelihood of a profit.[1] Because of this, the retroactive application of the tax can be upheld only if the taxpayer had sufficient notice that his conduct would be subject to a regulatory tax.

The majority concludes that the taxpayer had ample notice because the President's request for the tax was well publicized and known generally among investors. In addition, the President had specifically requested that the tax be retroactive. Nevertheless, the majority slides over the fact that many Presidents have requested a great deal of legislation which has never seen the light of day; to do so, it rationalizes that Congress ratified the executive action when it made the tax retroactive, citing *United States v. Heinszen & Co.*, 206 U.S. 370 (1907), and *Mattingly v. District of Columbia*, 97 U.S. 687 (1878).

Ratification, however, is not involved in this case and the majority's authority is, therefore, of no assistance on

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1. The tax imposed ranged from 15% to 22.5% of the value the foreign stocks acquired. The relevant language of the statute reads:

> (a) In general.—There is hereby imposed, on each acquisition by a United States person . . . of stock of a foreign issuer . . . a tax determined under subsection (b).
>
> (b) Amount of tax.—
>
> (1) Rates of tax.—Except as provided in paragraphs (2) and (3)—
>
> (A) Stock.—The tax imposed by subsection (a) on the acquisition of stock shall be equal to 15 percent of the actual value of the stock.
>
> (3) Rates during interim period.—In thecase of acquisitions of stock . . . made after January 25, 1967, and before the thirtieth day after the date of the enactment of this paragraph, the tax imposed by subsection (a) shall be 22.5 percent in the case of acquisition of stock . . . .

23 U.S.C. § 4911.

the issue of adequate notice. In *Heinszen*. the Supreme Court articulated the principle of ratification as follows:

> That where an agent, without precedent authority, has exercised in the name of a principal a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments or municipal corporations, is also elementary. 206 U.S. at 382.

The *Heinszen* Court held that Congress had the power to ratify a system of tariff duties imposed by the President upon goods coming into the Philippine Islands. The Court stated that the President had imposed and collected the tariffs without authority but concluded that the action was valid because of the subsequent ratification by Congress. Similarly in *Mattingly*, the Court upheld assessments laid, without authority, by a board of public works where Congress subsequently ratified the action.

These cases would be persuasive authority in the present case if the President had actually levied and collected the interest equalization tax. But he did not take such drastic action; he merely requested Congress to enact the tax. This distinction is significant because of the effect the two different courses of conduct have upon the manner in which a taxpayer conducts his business affairs. Where the President takes action, even without authority, the effect is immediate and certain. The taxpayer is required either to alter his course of conduct or to pay the tax. If the President's action is subsequently ratified, the taxpayer has at least had the benefit of certainty in arranging his affairs. If the action is held to be illegal he can recover the tax he has paid.

On the other hand, where the President merely requests Congress to take action, regardless of how well publicized the request is, the effect is postponed and uncertain. The Congress may reject the request altogether or may modify it to the extent that it only faintly re-

sembles the President's original proposal. It would be harsh and arbitrary to expect a person to arrange his affairs on the basis of such a request. If he declines to invest because of a Presidential request for legislation which is not forthcoming, he has no conceivable remedy for the loss he may have suffered.

The present case is almost identical to *Untermyer v. Anderson,* 276 U.S. 440 (1928). The Revenue Act of1924, 43 Stat. 313, imposed a tax on all gifts made any time during the calendar year of 1924, but did not become effective until June 2, 1924. Prior to its decision in *Untermyer,* the Court held the tax unconstitutional as applied to a gift made in January, 1924, on the ground that it was so arbitrary as to be a denial of due process. *Blodgett v. Holden,* 275 U.S. 142 (1927). In that case, the Court stated that "[i]t seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by a gift should thereafter be required to pay a charge for so doing." 275 U.S. at 147. In *Untermyer,* the Court considered the constitutionality of the same tax as applied to a gift made on May 23, 1924, just 12 days before the Act was approved by the President. The government argued that as retroactively applied to this gift the tax was not unconstitutional because the taxpayer had ample notice of the proposed tax and, in all likelihood, had made the gift at that particular time to avoid tax liability. The government pointed out that the gift was made three months after the proposed tax had been presented and while the conference report was still pending. The Court rejected the argument, holding the retroactive application of the tax unconstitutional. The Court stated:

> The mere fact that a gift was made while the bill containing the questioned provisions was in the last state of progress through Congress we think is not enough to differentiate this cause from the former one and to relieve the legislation of the arbitrary character there ascribed to it. To accept the contrary view would produce insuperable difficulties touching interpretation and practical application of the statute, and render impossible proper understanding

> of the burden intended to be imposed. The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken. 276 U.S. at 445-46.

The taxpayer in the present case, like the taxpayer in *Untermyer*, may have had ample notice of the proposed tax. But as the Court stated, he should not be required to guess on what the legislative outcome would be. This holding seems particularly appropriate in the present case because the taxpayer was required to guess the legislative outcome of the tax through the entire legislative process, whereas in *Untermyer* the tax had already passed both houses of Congress and awaited only the conference report, final congressional approval and the signature of the President.

I would hold the tax as applied to the transactions involved in this case unconstitutional.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RALPH E. PURVIS, *Plaintiff*, v. UNITED STATES OF AMERICA, *Defendant.*	Civil No. 4310 MEMORANDUM DECISION

The plaintiff makes a Fifth Amendment claim for a tax refund.

Although the facts are not in dispute, they should be briefly summarized.

Plaintiff is a lawyer who practiced his profession in the State of Washington until 1961 when he retired. Apparently he was financially successful and accumulated United States dollars. These dollars "flowed" into Canada and were invested by the plaintiff with the assistance of a Canadian brokerage firm in Canadian stocks.

The record discloses that these dollars were not idle and plaintiff bought and sold Canadian stocks from time to time up to and including the critical date.

The President of the United States, John F. Kennedy, publicized his announcement that the outflow of United States dollars into foreign countries because of American investors' purchases of foreign securities was causing a financial crisis in the United States, and the President advised the investing public that he was requesting the Congress of the United States to pass legislation that would alleviate this financial crisis. The President also declared that he would ask Congress to incorporate in the legislative enactment a provision that would provide for retroactivity of this enactment. The President's request to Congress involved taxing the trading in foreign securities by American investors. It was aimed at curtailing the outflow of American dollars into foreign exchanges because of a claimed

favorable climate for purchases by American investors of foreign securities.

Congress responded to the President's request by passing what is titled an interest equalization tax and made the tax retroactive to the date of the President's message.

The President's message was well publicized in the financial journals and the exhibits in this cause show that the plaintiff had knowledge of the President's request because of the wide publicity it generated.

Plaintiff continued to trade in Canadian securities with the dollars that he had invested prior to the President's announcement. Subsequently, he made a tax return and paid taxes imposed by the defendant, United States, pursuant to the congressional enactment.

Plaintiff makes two contentions in support of his claim for refund. He alleges that he was deprived of his property without due process because the congressional enactment imposed a retroactive tax and the enactment is therefore unconstitutional, and in support of this contention cites United States Supreme Court cases that dealt with gift and inheritance taxes. He concedes that the Supreme Court of the United States has approved legislation that provided for retroactivity in the income tax field, and he relies on his claim that the Supreme Court of the United States would decline to approve legislation that authorized retroactivity unless said legislation dealt with income tax.

Plaintiff also contends that his American dollars had flowed into Canada prior to the retroactive date, and therefore he should escape tax liability because his activities were outside the object of the legislative enactment, *i.e.*, preventing the outflow of American dollars during the critical period.

Plaintiff presented the last contention to the Congress of the United States, and although he was successful in getting Senate approval of his request to exempt his activities in trading the dollars that had been transferred into Canada from the United States prior to the President's announcement, and thereafter used in trading in Canadian securities during the retroactive period, the

House of Representatives refused to concur in the Senate amendment.

The record shows that the Secretary of the Treasury in his advice to the President and in his testimony before Congress in support of the legislative enactment also hoped that the enactment would effectively cause a change in the direction of the flow and that American dollars would drift back into the United States.

The leading case relied on by the Government in opposition to plaintiff's claim is *First National Bank in Dallas v. United States*, 420 F.2d 725 (Ct.Cl. 1970). Although this case did not directly deal with the constitutionality of the legislative enactment, this Court believes that the import of that opinion sustains the Government's view that the Court would have held the enactment constitutional had the claim been timely raised.

It is fundamental that a congressional enactment is presumed to be constitutional unless there is some overriding reason for a contrary determination by the Court. This Court fails to find adequate support for plaintiff's Fifth Amendment claim in the case law but believes that the Supreme Court of the United States would hold to the contrary and extend the doctrine of retroactivity in income tax cases to the facts in the instant case.

The Court further concludes that plaintiff's contention that his trading activities should be exempted because his dollars were in Canada prior to the President's announcement does not warrant a decision of this Court that would ingraft an exception to the general rule when the matter has been previously presented to the Congress of the United States and rejected. The Court therefore concludes that judgment should be granted to the defendant.

IT IS SO ORDERED.

DONE BY THE COURT this 14th day of April, 1972.

s/ WILLIAM N. GOODWIN

UNITED STATES DISTRICT JUDGE